Supreme Court, U.S.
FILED

No. 091547 JUN 11 2010

OFFICE OF THE CLERK

In the

Supreme Court of the United States

TONY L. KELLY,

Petitioner pro se,

v.

OLD DOMINION FREIGHT LINE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

TONY L. KELLY
5399 EMILY CIRCLE
ELLENWOOD, GA 30294
(770) 968-1433

Petitioner pro se

June 16, 2010

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

Whether the Courts below can escape liability for violating the Constitution of the United States and the constitutional and civil rights of Petitioner by allowing Georgia employers to continue practicing slavery under the OCGA 34-7-1, Master and Servant, Jim Crow slavery law under the disguise of "At-Will" employment law?

Whether the Courts below should be mandated to aid *pro se* litigants with negotiating internal rules and procedures, making it possible for them to obtain fairness in getting their cases heard when they are either not able to afford legal representation, or are otherwise forced to represent themselves?

LIST OF PARTIES

Tony L. Kelly, *pro se*, Petitioner

Old Dominion Freight Line, Inc., Respondent

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL PROVISIONS, STATUTES AND POLICIES AT ISSUE 1

STATEMENT OF THE CASE 2

A. Facts Giving Rise to This Case 2

B. The District Court Proceedings 4

C. The Appellate Court Proceedings 5

REASONS WHY CERTIORARI SHOULD BE GRANTED 6

I. The Court's supervisory power is needed to strike down the opinion of the Eleventh Circuit, which explicitly supports the perpetuation of *Southern, Confederate* Georgia's OCGA 34-7-1, "Master and Servant" slavery law, which directly violates and is repugnant to the U.S. Constitution. 10

II. The Court's supervisory powers are needed to prevent the courts below from prematurely dismissing cases, based on technicalities, of *pro se* litigants when they are forced, or otherwise decide to represent themselves. 11

CONCLUSION 12

APPENDIX

Appendix A: Eleventh Circuit Opinion, (Apr. 27, 2010) 1a

Appendix B: District Court Order (Aug. 28, 2009) 17a

Appendix C: U.S. Const. amend. XIII . . . 29a

U.S. Const. amend. XIV 29a

Title VII of the Civil Rights Act of 1964, introduction . . . 30a

Sec. 2000e-2(a) [Section 703(a)] 30a

OCGA 34-7-1, 'Master and Servant", with Judicial Decisions and General Considerations 32a

28 U.S.C. § 2403(b) 33a

TABLE OF AUTHORITIES

Cases

Federated Mut. Implement & Hdwe. Ins. Co. v. Elliott,
88 Ga. App. 266,
76 S.E.2d 568 (1953) ..... App. C, 33a

Headrick v. Fordham,
154 Ga. App. 415,
268 S.E.2d 753 (1980) ..... App. C, 33a

Small v. Nu Grape Co. of Am.,
46 Ga. App. 306,
167 S.E. 607 (1933) ..... App. C, 32a, 33a

Constitutional Provisions

U.S. Const. amend. XIII ..... 1, 2, 5, 6, App. C, 29a

U.S. Const. amend. XIV ..... 1, 2, 5, App. C, 29a

Statutes

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2403(b) ..... 1, 2, App. C, 33a

OCGA 34-7-1 ..... 1, 2, 6, 10, App. C, 32a

Title VII of the Civil Rights Act of 1964, including
§ 2000e-2 (Section 703) ..... 1, 2, 4, App. C, 30a

Other Authorities

http://www.eeoc.gov/eeoc/history/35th/history/index.html 8

http://www.eeoc.gov/eeoc/statistics/enforcement/race.cfm 8

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit for *Tony L. Kelly v. Old Dominion Freight Line, Inc.*, is unpublished. See App. A. On April 27, 2010, the Eleventh Circuit affirmed, per curiam, the August 28, 2009, decision of the United States District Court for the Northern District of Georgia for *Tony L. Kelly v. Old Dominion Freight Line, Inc.*, which is unreported. See App. B.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Eleventh Circuit's Opinion was rendered on April 27, 2010. See App. A.

28 U.S.C. § 2403(b) may apply, and this Petition is being served on the Attorney General of Georgia. The Eleventh Circuit did not, pursuant to 28 U.S.C. § 2403(b), certify to the Georgia Attorney General the fact that the constitutionality of a statute of that State was drawn into question.

CONSTITUTIONAL PROVISIONS, STATUTES AND POLICIES AT ISSUE

The relevant portions of the Thirteenth and Fourteenth Amendments are reproduced at App. C, 29a. The relevant portions of Title VII of the Civil Rights Act of 1964, including § 2000e-2(a) (Section 703(a)), and information related to them, are reproduced at App. C, 30a-32a. OCGA 34-7-1 and relevant Judicial Decisions and General

Considerations are reproduced at App. C, 32a-33a. 28 U.S.C. § 2403(b) is reproduced at App. C, 33a.

STATEMENT OF THE CASE

A. Facts Giving Rise to This Case

Slavery was established in the United States as a legal institution that provided for the proliferation of economic gain and security for Caucasian people. Slavery remained a legal institution and supported the view Caucasian people had of themselves as superior to Africans who eventually became Americans by brutal and inhumane physical and psychological force, until the passage of the Thirteenth Amendment to the United States Constitution ["13th Amendment"]. The Georgia "At-Will" employment law, OCGA 34-7-1, "Master and Servant" ["GA law"], is in direct violation of the 13th Amendment because it provides a legal basis for modern employers to conduct business and treat their employees as slaves. The wrongful termination and subsequent treatment of Kelly, who is African-American and a direct descendant of "slaves", by Old Dominion[1], which is strongly a Southern, Caucasian male-dominated entity, also violated Title VII of the Civil Rights Act of 1964 and proves that slavery still exists. 28 U.S.C. § 2403(b), may apply to this case.

The GA law, which the courts below actively enforce, violates the Fourteenth Amendment to the United States Constitution ["14th Amendment"], by depriving citizens of due process and equal protection

---

[1] Also by the courts.

of the laws, and by defending Old Dominion, the courts below violated both Kelly's constitutional and civil rights. The courts below, which are pro-employer and pro-attorney, consistently and prejudicially aligned with Old Dominion by basing each of its judgments and opinions solely on Old Dominion's false allegations and manipulations against Kelly. Concurrently, the courts below completely ignored Kelly's pleas for fairness to be heard, depriving him of his rights to equal protection to the laws and procedural due process by averting the facts and evidence of the case from being presented, and ultimately depriving him of due justice. Knowing that mistakes would be made, and to the delight of Old Dominion and its counsel [Brennan Bolt ("Bolt")], the judges and court personnel left Kelly to fend for himself in spite of his best efforts to be fully compliant.

Old Dominion and the courts below apparently had a hidden agenda in its handling of this action, which was ultimately to block Kelly from presenting the facts and evidence of his case. Being that the GA law is "good for business",[2] the courts below took an active position in deflecting Kelly's efforts so that the case would be dismissed without being heard, which ultimately protects the GA law from abolishment as well as the courts', attorneys' and employers' interests. Old Dominion and the courts below were not so much concerned about the intentional discriminatory aspects of the lawsuit as much as they were about the possibility of the GA law being abolished, which would

---

[2] Quote from Georgia Legislative Liaison, Charlie Schroeder, who refused Kelly's wife's request for a copy of the "At-Will" law.

directly and adversely affect the Georgia business infrastructure.

B. The District Court Proceedings

On August 11, 2008, Kelly, an "At-Will" employee, brought suit against Old Dominion in the United States Court for the Northern District of Georgia ["District Court"], seeking damages and abolishment of the GA law. Kelly alleged that Old Dominion violated Title VII of the Civil Rights Act of 1964 based on his race and retaliation after he was wrongfully terminated on May 10, 2007. Kelly, who was forced to enter the proceedings *pro se*, naturally experienced difficulty with navigating the system, which presented Bolt with an immediate opportunity to falsely claim Kelly "refused to participate" throughout proceedings. Bolt took advantage of Kelly's *pro se* status by presenting Kelly as "defiant" and "recalcitrant" to the Court, which supported Bolt from the beginning by imposing sanctions on Kelly without regard to his *pro se* status and pleas for assistance. Additionally, Kelly was rudely informed by Court personnel that he would not receive any assistance in pursuing his action and that he needed to "read the rules". In spite of Kelly's best efforts to understand and comply with the rules of the court and those of Federal procedure, the Court ultimately ordered dismissal of the case before any of the facts and evidence could be presented. In response to Bolt's allegations, Kelly, who believed the magistrate judge to be actively presiding over the case, appealed for the truth to be heard, but the magistrate never responded, nor did he take any of Kelly's pleadings into consideration in preparing its orders. Kelly contends the magistrate judge focused exclusively on Bolt's motions and allegations, which

were precisely mimicked by the Court in issuing its orders.

A considerable detriment to Kelly's case occurred during a scheduling conference when Bolt, positioning Kelly for failure, inquired Kelly as to how he wished to communicate throughout the discovery process. Kelly responded by stating his preference for communication in writing and via U.S. mail, to which Bolt readily agreed. However, Bolt complained to the Court that Kelly willfully ignored his attempts at communicating via phone, thus breaching his agreement with Kelly for the way they would communicate. The successful set-up of this case to be dismissed without any of the facts and evidence being presented was made possible by the District Court, which exclusively allowed Bolt to cheat, lie and otherwise manipulate the facts without regard to Kelly's pleas for intervention and fair consideration. Given such, the magistrate judge abused his discretion in handling this case, denying Kelly equal protection of the law and his due process rights. Furthermore, the magistrate judge's (ultimately the Court's) actions corroborate Kelly's assertion that it is pro-employer and pro-"At-Will", which supports slavery and violates the 13th and 14th Amendments, and Kelly's civil and constitutional rights. Additionally, the abhorrent treatment and absence of guidance and protection for *pro se* litigants repudiates all fairness to the citizens whose tax dollars contribute to the salaries of magistrate judges and existence of the Courts.

C. The Appellate Court Proceedings

On April 27, 2010, the United States Court of Appeals ["Appellate Court"] issued its Opinion,

affirming the District Court's August 29, 2009, Order dismissing Kelly's action. Apparently, the Appellate Court did not review Kelly's brief and merely regurgitated the exact same verbiage documented in the District Court's Order, which it used to justify affirmation of the magistrate judge's ruling. Once again, Kelly's pleas for fairness and justice were completely ignored. Not a single consideration was given to the facts and evidence of Kelly's case, nor of his predicament of being forced to represent himself in a Court where he was not only not welcome, but hated. Because the Appellate Court affirmed the magistrate judge's order, it also denied Kelly equal protection of the laws and his due process rights.

REASONS WHY CERTIORARI SHOULD BE GRANTED

If this Court does not grant certiorari and ultimately abolish Georgia's OCGA 34-7-1, "Master and Servant" Jim Crow-era slavery law (and similar laws across the U.S.), then it allows the 13th Amendment to breach what it promises to deliver: abolishment of slavery. To be able to survive, Americans need to work. Much is said about the need for creating jobs for American citizens, but nothing is said or done to ensure job security. This is extremely important to working Americans because without job security, there is no freedom, and master-employers hold the key to the American workers' livelihoods. Thus, abolishing the GA law is of great **national importance** because it is representative of the "At-Will" employment laws on the statute books of the majority of states, especially those in the *Deep South*, and these laws affect every working-class American who is at the mercy of their master-employers. The GA

law ultimately undermines the core values of freedom, life, liberty and the pursuit of happiness, which are guaranteed by the Constitution of the United States, for every one of its citizens.

Not only is the title of the GA law reminiscent of slavery, but the foundational characteristics of the "master" and of the "servant" provide the legal groundwork on which master-employers can mistreat their servant-employees much like they did when the legal institution of slavery existed on plantations. Because slavery "At-Will" employment laws are "good for business", individual states, like Georgia, are not going to hold themselves accountable for the fair treatment of servant-employees as long as their businesses remain lucrative[3]. Master-employers get away with overt and covert oppression, discrimination, racism (hatred), intimidation, manipulation, exploitation and retaliation against servant-employees they illegally terminate, all without suffering any consequences - much like "masters" of plantations who got rid of "slaves" who they deemed no longer useful (usually by killing them). There were no legal repercussions, so it meant nothing for these masters to get rid of one slave who could easily be replaced by another purchased at auction. This literally is the approach of today's master-employers toward their servant-employees. Master-employers may not outright kill servant-employees, but they definitely carry-out financial and mental lynchings, as firing "at-will" destroys lives. "At-Will" employment laws cause

---

[3] This not only includes employers, but the courts, attorneys, and every agency or person that benefits from the blood, sweat and tears of Georgia's (and all U.S.) servant-employees.

financial harm to servant-employees who, at the mercy of master-employers, are either terminated or live under the constant threat of termination, which gives financial control of master-employers over servant-employees.

What makes the oppressive "At-Will" laws even worse for working Americans is that there literally is no protection or recourse for the greater masses of servant-employees who are terminated at the master-employer's whim. In Kelly's experience, the Equal Employment Opportunity Commission ["EEOC"], with its stated mission: *the elimination of illegal discrimination from the workplace*[4] is an absolute waste of taxpayer dollars. Kelly, after waiting 10 months of investigation of his case by the EEOC, was informed that, in order for discrimination to be confirmed, Kelly would be required to satisfy a comparison rule, which effectively meant that Kelly would have to demonstrate that a White man was treated differently in the exact scenario in which Kelly was terminated. However, because Black men and White men historically have never been treated equally, Kelly would never be able to satisfy the comparison rule. In fact, Kelly could only report that, when anything goes wrong at Old Dominion, White men get moved to a different position and Black men get fired.

According to EEOC, 33,579 racial discrimination complaints were filed in the U. S. in 2009[5]. Of these,

---

[4] http://www.eeoc.gov/eeoc/history/35th/history/index.html.

[5] http://www.eeoc.gov/eeoc/statistics/enforcement/race.cfm.

20,530 (66%) were found to have "no reasonable cause" (no violation of the law), and only 1,201[6] (3.9%) cases were found to have "reasonable cause" (violation of the law). Kelly contends this disparity is evidence that the comparison rule is unjust because it cannot be satisfied in the vast majority of cases because racism typically is covert; however, this does not prove Kelly was not discriminated against.

Furthermore, Kelly sought the services of various local attorneys who, although they agreed Kelly has a good case, declined representation because of the stronghold between employers and pro-employer courts. The attorneys articulated that, because of this stronghold, they cannot win employment discrimination cases so it is not in their best interest to try to litigate them. Through personal experience, Kelly can attest to the existence of a stronghold between Georgia employers and the courts, which keeps its "At-Will" law intact because it is "good for business". Specifically, the laws, rules and procedures involved in these types of lawsuits are strategically designed to keep master-employers, the courts, the EEOC and various other agencies in business. Judges, attorneys and court personnel are in place to ensure that nothing and/or nobody is able to penetrate that stronghold.

Whether in Georgia or another state, Americans need employment to be able to survive, and "**we the people**" need job security so we can stop living in

---

[6] It is unknown how many of these involved White women and not African-Americans or other non-white people.

constant fear of being terminated[7] at the whim of employers who are racist or otherwise decide they do not like us for one reason or another. With "At-Will" employment laws on statute books, employers can destroy individuals and families without any repercussions from the law, which amounts to mental and financial lynchings of American workers. To compound the matter, each time an employee is terminated, it becomes more difficult to get hired at another job, as employers use these terminations to discriminate during the hiring process.

I.

The Court's supervisory power is needed to strike down the opinion of the Eleventh Circuit, which explicitly supports the perpetuation of *Southern, Confederate* Georgia's OCGA 34-7-1, "Master and Servant" slavery law, which directly violates and is repugnant to the U.S. Constitution.

"At-Will" slavery laws are "good for business", which Georgia's master-employers, courts and other agencies will continue practicing as long as they can get away with it. Georgia is not going to police itself, nor will any other state that relies heavily on its "slaves" for prosperity. This is the only Court that has the power to abolish "At-Will" laws, and can ensure the establishment of equitable employment laws to be uniformly applied across the entire nation.

---

[7] This is mental torture/lynching

II.

The Court's supervisory powers are needed to prevent the courts below from prematurely dismissing cases, based on technicalities, of *pro se* litigants when they are forced, or otherwise decide to represent themselves.

The dismissal of Kelly's action by the District Court, and affirmed by the Appellate Court, denied Kelly of his right to due process and due justice, as he was never allowed the opportunity to present the facts and evidence of his case. Upon filing his action, Kelly quickly learned that the judges, court personnel and opposing counsel hated his presence, and made it as difficult as possible for him to present his case. Local Rules of the Court were given to Kelly who was required to comply with them as if he were a skilled attorney, yet there was no education or guidance on court procedures and the Federal Rules so, naturally, mistakes would be made[8]. Kelly also learned that the courts below are hostile and antagonistic to the citizens whose tax dollars maintain their existence, but dare to use *their* courts. Given these facts, this Court's authority is needed to establish laws that will govern the provision of education and aid to *pro se* litigants who deserve a fair chance of getting their cases heard, which will result in procedural due process and fair justice.

---

[8] The mere existence of these Rules cannot force Kelly to possess a full working knowledge of them simply because he brought an action before the Court. Kelly was left to fend for himself by the magistrate judge who was nowhere to be found when Kelly filed motions requesting his response.

CONCLUSION

Based on the foregoing reasons, Petitioner respectfully submits that this Petition for a Writ of Certiorari should be granted. The Court may wish to consider summary reversal of the decision of the Eleventh Circuit Court of Appeals.

Dated: June 16, 2010

Respectfully submitted,

Tony L. Kelly, *pro se*
5399 Emily Circle
Ellenwood, GA 30294
(770) 968-1433

APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix A: Eleventh Circuit Opinion, (Apr. 27, 2010) 1a

Appendix B: District Court Order (Aug. 28, 2009) 17a

Appendix C: U.S. Const. amend. XIII 29a

U.S. Const. amend. XIV 29a

Title VII of the Civil Rights Act of 1964, introduction 30a

Sec. 2000e-2(a) [Section 703(a)] 30a

OCGA 34-7-1, "Master and Servant", with Judicial Decisions and General Considerations . . 32a

28 U.S.C. § 2403(b) 33a

APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 09-14490

[Filed April 27, 2010]

TONY L. KELLY,	)
	)
Plaintiff-Appellant,	)
	)
versus	)
	)
OLD DOMINION FREIGHT LINE, INC.,	)
	)
Defendant-Appellee.	)

D. C. Docket No. 08-02566-CV-ECS-1

Appeal from the United States District Court for the Northern District of Georgia

Before BLACK, PRYOR and FAY, Circuit Judges.

PER CURIAM:

Tony L. Kelly, an African-American male proceeding *pro se*, appeals the magistrate judge's grant of defendant Old Dominion Freight Line, Inc.'s ("Old

Dominion") motion to dismiss his complaint alleging racial discrimination and retaliation, filed pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(a)(1) and 2000e-3(a), as well as its orders imposing attorneys' fees and costs and denying his motion for reconsideration.[1] On appeal, Kelly argues that the magistrate denied him due process and abused his discretion in dismissing his complaint pursuant to Fed.R.Civ.P. 37(d) and 41, ordering him to pay attorneys' fees and costs, and denying his motion for reconsideration. For the reasons set forth below, we affirm.

I.

Kelly brought suit against his employer, Old Dominion, asserting that Old Dominion terminated his employment because of his race and as retaliation. He also asserted claims of invasion of privacy, harassment, hostile work environment, defamation, emotional distress, "possible violation[s] of [Georgia] public policy," and "possible hate crimes."

Kelly alleged that his home telephone number was changed in Old Dominion's computer database, causing him to miss work assignments. Various supervisors attempted to correct the phone number, but the changes were not permanent. Eventually, Dean Scruggs, the Line Haul Manager, corrected the problem, and Kelly had no further problems receiving calls for work. Kelly requested an investigation into

---

[1] Kelly and Old Dominion agreed to allow a magistrate judge to conduct all proceedings in the case, including the entry of a final judgment.

how his phone number was changed in the first place. Kelly was informed that the phone number was changed because of a computer glitch, but he continued to attempt to contact Old Dominion's CEO about the problem. Old Dominion subsequently terminated Kelly. Kelly stated that he believed that Scruggs illegally changed his phone number in Old Dominion's database because Scruggs did not like that Kelly was in an interracial relationship with a white woman.

Old Dominion responded that Kelly's complaint failed to state a claim upon which relief could be granted, and it contended that it acted in good faith and based on legitimate, non-discriminatory considerations.

The magistrate issued a notice of "Guidelines for Discovery and Motion Practice," which stated that *pro se* litigants must observe the Federal Rules of Civil Procedure, as well as the "District Court's Local Rules and Instructions Regarding Pretrial Proceedings." The notice also stated in bold print that, pursuant to Fed.R.Civ.P. 26(c) and 37, and N.D. Ga. Local Rule 37.1A, "[c]ounsel or *pro se* litigants are required to confer, by telephone or in person, in good faith before bringing a discovery dispute to the court."

On October 31, 2008, Old Dominion separately filed its preliminary report and discovery plan, and certificate of interested persons, noting that it had attempted to confer with Kelly so that the documents could be filed jointly. In a letter to Kelly, Brennan Bolt, Old Dominion's counsel, noted that he had attempted to contact Kelly to schedule a Rule 26(f) conference, but that Kelly's wife had informed him that Kelly would not be proceeding with the case until he

received a "recommendation" from the judge. Kelly subsequently filed his certificate of interested persons, preliminary report, and discovery plan after the magistrate judge ordered him to do so.

On January 28, 2009, Kelly filed a motion to compel discovery, asserting that Old Dominion had not responded to his January 5, 2009, discovery requests.

Old Dominion responded that Kelly's motion to compel was premature because, pursuant to the Federal and Local Rules of Civil Procedure, it had 33 days in which to respond to Kelly's discovery requests. It also asserted that Kelly's motion did not comply with Fed.R.Civ.P. 37(a)(1) and Local Rule 37.1(A) because Kelly had not filed a certificate of service with the court, had not conferred in good faith with Bolt prior to filing the motion to compel, and had not certified that he attempted, in good faith, to confer with Bolt. A January 22, 2009, letter addressed to Kelly stated that Old Dominion had received Kelly's discovery requests and would respond by February 9, 2009, the deadline provided by the Federal and Local Rules.

On February 11, 2009, Kelly filed a second motion to compel discovery, asserting that Old Dominion had refused to answer his discovery requests.

Old Dominion responded that, on February 9, 2009, it served its objections and responses to Kelly's discovery requests via U.S. Mail. A certificate of service filed with the court verified this. Old Dominion noted that Kelly again had made no effort to confer with Bolt regarding discovery and had failed to certify that he made such an effort. Old Dominion asked the

court to deny Kelly's motion to compel and award costs and attorneys' fees incurred in opposing Kelly's motion to compel.

On March 27, 2009, Old Dominion filed a motion to dismiss, or, in the alternative, to compel production of documents and impose sanctions. It explained that, in addition to Kelly's previous discovery violations, Kelly had failed to respond to its request for production of documents, which it served on Kelly on January 29, 2009, by the March 3, 2009, deadline. Old Dominion stated that Bolt left voice mails for Kelly on March 9, 10, and 12, 2009, but that Kelly never responded. On March 13, 2009, Bolt sent Kelly a letter noting the March 3 discovery deadline and informing Kelly of the March 9, 10, and 12 voice mails. The letter, which was delivered to Kelly on March 16, 2009, asked Kelly to contact Bolt by March 18, 2009. Old Dominion noted that, on March 20, it requested a conference with the court to resolve the discovery dispute. On March 24, 2009, the court advised Old Dominion that Kelly "refused to participate in a telephone conference because of a 'conflict of interest.'"

The magistrate denied Kelly's motions to compel because Kelly failed to certify that he attempted to confer with Old Dominion to obtain the requested discovery and failed to engage in any good faith effort to resolve the dispute before filing his motion. The magistrate further found that both of Kelly's motions to compel lacked merit because the first motion was filed before Old Dominion's deadline to respond and the second motion was signed one day after Old Dominion had served its objections and responses to Kelly's discovery requests. Pursuant to Fed.R.Civ.P. 37(a)(5)(B), the magistrate awarded Old Dominion

reasonable expenses, including attorneys' fees, for the expenses incurred in opposing Kelly's meritless motions to compel. Although the magistrate found that Kelly willfully failed to participate in discovery and comply with the court's rules, it determined that "dismissal is not yet an appropriate sanction." It ordered Kelly to respond to Old Dominion's first request for production of documents and warned that "the failure to comply with this order or any other failure to comply with his discovery obligations as delineated in the Federal Rules of Civil Procedure will subject [Kelly] to additional sanctions, including the dismissal of this case."

Kelly filed certificates of service stating that, on May 26 and 30, 2009, and June 3, 2009, he served, via U.S. Mail, responses to Old Dominion's first request for production of documents.

Old Dominion sought to depose Kelly, and, on June 23, 2009, Kelly filed a motion in opposition to Old Dominion's notice of deposition, asserting that Old Dominion had scheduled his deposition simply to harass him and had not demonstrated a need for the deposition. He asked the court to enter an order protecting him from the deposition.

On June 30, 2009, Old Dominion filed a motion to dismiss and to impose sanctions, or, in the alternative, to compel production of documents. It explained that, on June 3, 2009, Bolt wrote to Kelly requesting that Kelly contact him regarding his availability for the deposition. Kelly never responded, and, on June 12, 2009, Old Dominion unilaterally noticed Kelly's deposition for June 25, 2009, at 10:00 a.m. Bolt faxed and mailed the notice to Kelly. Upon receiving Kelly's

motion for a protective order, Bolt faxed Kelly a letter stating that Kelly was required to appear at his deposition unless the court granted his request for a protective order. On June 25, 2009, Bolt and a representative of Old Dominion appeared for Kelly's deposition. Kelly did not appear, did not respond to a voice mail, and did not attempt to contact Bolt. Old Dominion asked the court to dismiss Kelly's complaint with prejudice and award reasonable attorneys' fees and expenses.

Kelly filed a motion for summary judgment, but did not respond to Old Dominion's motion to dismiss.

The magistrate granted Old Dominion's motion to dismiss, noting that the motion was unopposed. It found that dismissal was warranted based on Kelly's willful violations, namely, his (1) refusal to participate in a Rule 26(f) conference until instructed to do so at a November 24, 2008, scheduling conference; (2) filing of his first motion to compel before the deadline for submitting discovery responses and without making any effort to confer with Old Dominion; (3) filing of a second motion to compel without attempting to confer with Old Dominion; (4) failure to respond to Old Dominion's first request for discovery; (5) failure to return Bolt's phone calls regarding his responses to Old Dominion's written discovery; (6) failure to respond to Bolt's March 13 letter regarding Kelly's failure to serve discovery responses; (7) refusal to participate in a telephone conference with the court to resolve discovery disputes; (8) filing of a frivolous motion for a protective order to avoid being deposed; (9) failure to confer with Old Dominion before filing the motion for the protective order; and (10) failure to appear for his deposition. It dismissed Kelly's

complaint after finding that lesser sanctions were inadequate, based on Kelly's "clear violations of the Federal Rules in the wake of th[e] court's prior application of lesser sanctions and explicit warning that further violations could result in dismissal." The magistrate also awarded Old Dominion reasonable expenses and attorneys' fees, pursuant to Fed.R.Civ.P. 37(a)(3), noting that Kelly had not responded to Old Dominion's motion for sanctions and there was no evidence of mitigating circumstances that would make an award of expenses unjust.

Kelly filed multiple copies of a "motion letter of appeal," in which he asked the court to reconsider its dismissal of his case, hold an "in-person conference," and allow him to submit a response to Old Dominion's motion to dismiss. He contended that the court was biased in favor of Old Dominion and did not consider any of the facts he submitted during discovery. Kelly asserted that he had proceeded with discovery in good faith and fully cooperated with Old Dominion and the court.

The magistrate construed Kelly's "motion letter of appeal" as a motion for reconsideration. It denied the motion, finding that Kelly "has not offered any new evidence, nor has he pointed to a development or change in controlling law, nor a clear error in the Court's judgment."

II.

A. Dismissal

We review dismissals under Fed.R.Civ.P. 37 and 41 for abuse of discretion. *Gratton v. Great Am.*

Communications, 178 F.3d 1373, 1374 (11th Cir. 1999). The district court's factual findings are reviewed for clear error. *Zocaras v. Castro*, 465 F.3d 479, 483 (11th Cir. 2006). Although *pro se* pleadings are to be construed liberally, "procedural rules in ordinary civil litigation" should not be interpreted "so as to excuse mistakes by those who proceed without counsel." *McNeil v. United States*, 508 U.S. 106, 113, 113 S.Ct. 1980, 1984, 124 L.Ed.2d 21 (1993).

Under Rule 37(a)(5)(B), if a motion for an order compelling discovery is denied, the district court "must, after giving an opportunity to be heard, require the movant ... to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees," unless "the motion was substantially justified or other circumstances make an award of expenses unjust." Fed.R.Civ.P. 37(a)(5)(B). Pursuant to Rule 37(d), a court may sanction a party who, after being served with proper notice, fails to appear for his deposition. Fed.R.Civ.P. 37(d)(1)(A)(i). Dismissal of the action is listed as an appropriate sanction for the party's failure to appear for the deposition. Fed.R.Civ.P. 37 (d)(3), (b)(2)(A)(v). "[T]he sanction of dismissal is a most extreme remedy and one not to be imposed if lesser sanctions will do." *Hashemi v. Campaigner Publ'ns, Inc.*, 737 F.2d 1538, 1538-39 (11th Cir. 1984) (upholding dismissal pursuant to Fed.R.Civ.P. 37(d)). However, "the district court retains the discretion to dismiss a complaint where the party's conduct amounts to flagrant disregard and willful disobedience of the court's discovery orders." *Id.* at 1539 (quotation omitted); *see Griffin v. Aluminum Co. of Am.*, 564 F.2d 1171, 1172 (5th Cir. 1977) (noting that the former Fifth Circuit "has approved dismissal as a sanction

imposed under Rule 37(d), [where] plaintiff's failure to comply with discovery has involved either repeated refusals or an indication of full understanding of discovery obligations coupled with a bad faith refusal to comply"). The district court's inaction on a party's motion for a protective order to postpone the taking of his deposition does not relieve the party of the duty to appear for the deposition. *Hepperle* v. *Johnston*, 590 F.2d 609, 613 (5th Cir. 1979).

Under Rule 41(b), "[a] district court is authorized, on defendant's motion, to dismiss an action for failure to prosecute or to obey a court order or federal rule." *Goforth v. Owens*, 766 F.2d 1533, 1535 (11th Cir. 1985). "Dismissal of a case with prejudice is considered a sanction of last resort, applicable only in extreme circumstances." *Id.* In reviewing a dismissal under Rule 41(b), we consider "whether there is a clear record of delay or willful contempt and a finding that lesser sanctions would not suffice." *Id.* (quotation omitted). Mere negligence or confusion is not sufficient to justify a finding of delay or willful misconduct. *McKelvey v. AT&T Techs., Inc.*, 789 F.2d 1518, 1520-21 (11th Cir. 1986). Dismissal pursuant to Rule 41(b) "upon disregard of an order, especially where the litigant has been forewarned, generally is not an abuse of discretion." *Moon v. Newsome*, 863 F.2d 835, 837 (11th Cir. 1989).

The magistrate did not abuse his discretion in dismissing Kelly's complaint under either Rule 37(d) or 41(b). Kelly committed numerous discovery violations. First, Kelly filed a motion to compel before Old Dominion's deadline for producing its discovery documents. If Kelly had complied with the federal and local rules by consulting with Old Dominion before

filing his motion to compel, he would have learned that Old Dominion was planning to produce the documents and had until February 9, 2009, to do so. Kelly should have been aware of his duty to confer because the "Guidelines for Discovery and Motion Practice," issued by the court at the beginning of proceedings, stated in bold print that, pursuant to Fed.R.Civ.P. 26(c) and 37, and Local Rule 37.1A, "[c]ounsel or *pro se* litigants are required to confer, by telephone or in person, in good faith before bringing a discovery dispute to the court." Furthermore, Kelly's motion to compel did not contain a certification that Kelly had attempted, in good faith, to resolve the dispute with Old Dominion. Fed.R.Civ.P. 37(a)(1) requires motions to compel to contain such a certification, and Kelly's pro *se* status does not excuse noncompliance with procedural rules. *See* Fed.R.Civ.P. 37(a)(1) (requiring that a motion to compel discovery "include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action"); *McNeil*, 508 U.S. at 113, 113 S.Ct. at 1984.

Kelly's second motion to compel was also deficient and meritless because Kelly did not confer with Old Dominion to resolve the discovery dispute or include a certification in his motion, and Old Dominion had, in fact, served its discovery requests by the February 9, 2009, deadline. *See* Fed.R.Civ.P. 5(b)(2)(C) (providing that "service [by mail] is complete upon mailing").

In addition to filing two deficient and meritless motions to compel, Kelly also failed to file timely responses to Old Dominion's request for production of documents. In a March 13, 2009, letter, Bolt informed Kelly that his discovery responses were due on March

3, 2009. Although Kelly contends that he never received this letter, a Federal Express receipt indicates that the letter was delivered to Kelly's residence on March 16, 2009. Kelly also contends that he did not receive Old Dominion's discovery requests until April 23, 2009, but he failed to raise this issue before the magistrate because he did not respond to Old Dominion's motion to dismiss prior to the district court's order of dismissal, which was entered almost two months after the filing of Old Dominion's motion.

In spite of Kelly's numerous discovery violations, the magistrate denied Old Dominion's first motion to dismiss, finding that dismissal was not yet warranted. The magistrate warned Kelly that he was required to comply with the Federal Rules of Civil Procedure, and that failure to do so would result in additional sanctions, "including the dismissal of this case." After receiving this warning, Kelly failed to respond to Bolt's requests to schedule his deposition and failed to report for his deposition on June 25, 2009. In a letter that Old Dominion faxed to Kelly, Old Dominion informed Kelly that he was required to attend the deposition unless the court granted Kelly's motion for a protective order before the date of the deposition, which the court did not do. Case law confirms that the filing of a motion for a protective order does not shield a party from his duty to appear for his deposition. *See Hepperle*, 590 F.2d at 613. Furthermore, Kelly never attempted to confer with Old Dominion before filing his motion in opposition to the deposition. *See* Fed.R.Civ.P. 37(a)(1).

Although Kelly contends that his repeated discovery violations were not willful, his failure to cooperate with Old Dominion to resolve discovery disputes indicates that Kelly's violations were willful,

and that he made no good faith attempt to learn the rules, comply with the rules, or correct his errors. Thus, the magistrate did not clearly err in determining that Kelly's failure to appear at his deposition was willful. *See Zocaras*, 465 F.3d at 483. Although dismissal is an extreme sanction, Kelly had been warned that his case could be dismissed if he continued to violate the Federal Rules of Civil Procedure. After the magistrate issued this warning, Kelly failed to appear for his deposition or confer with Old Dominion before filing his motion for a protective order. In dismissing Kelly's case, the magistrate specifically found that no sanction less than dismissal would suffice, given that Kelly continued to violate the rules after being warned. This determination is not clearly erroneous and justifies the dismissal of Kelly's complaint. *See Hashemi*, 737 F.2d at 1538-39; *Moon*, 863 F.2d at 837.

B. Due Process

Kelly also has failed to show that the magistrate denied him due process by dismissing his complaint. At the outset of the proceedings, the magistrate issued a notice informing the parties that they were required to comply with the Federal Rules of Civil Procedure. Later, the magistrate warned Kelly that his complaint could be dismissed if he continued to violate the rules, but Kelly subsequently violated the rules by failing to appear for his deposition. Furthermore, the magistrate's dismissal was not based solely on Old Dominion's allegations, but instead, was based on the record, which showed that (1) Kelly's first motion to compel was filed prior to Old Dominion's deadline for responding; (2) Kelly's second motion to compel was filed 2 days after Old Dominion served its discovery

responses; (3) Kelly's motions to compel failed to comply with requirements set forth in Fed.R.Civ.P. 37(a)(1); and (4) Kelly failed to respond to Old Dominion's discovery requests within 30 days of receiving the requests. Kelly also did not dispute Old Dominion's assertion that he failed to appear for his deposition. Because Kelly was warned of the consequences of failing to comply with the rules, and because the record objectively showed that Kelly committed numerous discovery violations, Kelly's due process rights were not violated by the dismissal of his complaint.

C. Attorneys' Fees and Costs

A district court's award of attorneys' fees pursuant to Fed.R.Civ.P. 37 is reviewed for abuse of discretion. *See BankAtlantic v. Blythe Eastman Pain Webber, Inc.*, 12 F.3d 1045, 1052 (11th Cir. 1994). As noted previously, the district court may sanction a party who fails to appear for his properly-noticed deposition. *See* Fed.R.Civ.P. 37(d)(1)(A)(i). In addition to, or instead of, sanctions, "the court *must* require the party failing to act . . . to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust." Fed.R.Civ.P. 37(d)(3) (emphasis added).

Kelly asserts on appeal that the magistrate erred in awarding Old Dominion attorneys' fees and costs. To the extent that Kelly challenges the award of attorneys' fees and costs based on the magistrate's denial of his motions to compel, Kelly's argument lacks merit. Kelly appears to challenge only the award of the fees, not the amount of the fees. The magistrate did

not abuse its discretion in ordering Kelly to pay attorneys' fees and costs incurred by Old Dominion in opposing Kelly's motions to compel. As noted previously, Kelly's motions to compel were both meritless and failed to comply with the procedural rules. Moreover, prior to the magistrate's order awarding fees and costs, Kelly failed to present any mitigating circumstances that would make the award of fees unjust. Thus, this Court sustains this award of attorneys' fees and costs.

The magistrate also did not abuse its discretion in awarding Old Dominion attorneys' fees and costs based on Kelly's failure to appear for his deposition. Rule 37 requires the award of attorneys' fees and costs that are incurred as a result of a party's failure to appear for his deposition, unless the failure to appear was justified or other circumstances would make the award unjust. *See* Fed.R.Civ.P. 37(d)(3). As noted above, Kelly failed to show that his absence at his deposition was justified. In addition, Kelly failed to respond to Old Dominion's motion for attorneys' fees and costs, and, therefore, failed to present any circumstances that would make an award of costs unjust. Thus, the magistrate did not abuse its discretion in awarding the fees.

D. Motion to Reconsider

We review for abuse of discretion a district court's denial of a motion to reconsider. *Corwin v. Walt Disney Co.*, 475 F.3d 1239, 1254 (11th Cir. 2007).

A review of the record shows that the magistrate did not abuse its discretion in denying Kelly's motion for reconsideration because Kelly failed to present any

additional evidence, or otherwise show that relief from judgment was justified, and, as noted above, the magistrate properly dismissed Kelly's complaint. *See Corwin*, 475 F.3d at 1239; Fed.R.Civ.P. 60(b). Accordingly, based on our review of the record and consideration of the parties' briefs, we affirm the magistrate's dismissal of Kelly's complaint, imposition of attorneys' fees and costs, and denial of his motion to reconsider.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

Case No. 1:08-CV-2566-ECS

[Filed August 28, 2009]

TONY L. KELLY,	)
	)
Plaintiff,	)
	)
v.	)
	)
OLD DOMINION FREIGHT LINE, INC.,	)
	)
Defendant.	)
	)

ORDER

The above-styled matter is before the Court on Plaintiff's motion for summary judgment [Doc. 47]; Plaintiff's "motion letter" to the Court [Doc. 49];[1] Defendant's motion to dismiss, to compel, for sanctions, and to extend discovery [Doc. 45]; and

[1] The Docket characterizes this paper as a "motion for length of time for decision." The motion appears to request this Court to advise Plaintiff how long it will take to decide Plaintiff's motion for summary judgment.

Defendant's motion to stay [Doc. 48]. Defendant has responded in opposition to Plaintiff's motion for summary judgment, but has filed no response to Plaintiff's "motion letter." [Doc. 52].[2] Plaintiff has responded only to Defendant's motion for stay. Therefore, Defendant's other motions [Doc 45, 48], are deemed unopposed. See LR 7.1B, NDGa. For the reasons expressed herein, Defendant's motion to dismiss and Defendant's motion for sanctions are **GRANTED**; Defendant's motion to compel, motion to stay and motion for extension of time to complete discovery are **DENIED as moot**. Finally, Plaintiff's motion for summary judgment and "motion letter" are **DENIED**.

I.
Background

Plaintiff, proceeding pro se, filed this action on August 11, 2008, alleging race discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U. S. C. §§ 2000e et seq. [Doc. 1]. Defendant attempted to confer with Plaintiff regarding the parties' Rule 26(f) conference and the completion of the preliminary report and discovery plan, but Plaintiff refused to participate. See [Docs. 6, 8]. Accordingly, the Court granted Defendant's request for a scheduling conference with the Court, which was held on November 24, 2008. [Docs. 10. 11]. At the scheduling conference, Plaintiff was advised of his rights and obligations with respect to litigating his case, as well as the requirements that he comply with the Federal Rules of Civil Procedure and the Local

[2] This Court notes that no response would appear to be required. See note 1, supra.

Rules of this Court. The parties also indicated their consent to proceed before the undersigned magistrate judge pursuant to 28 U.S.C. § 636 (c) (1). [Doc. 12].

Thereafter, on or about January 5, 2009, Plaintiff served a "Request for Evidence for Discovery" and a "Request for Document [sic] for Discovery" on Defendant's counsel. See [Doc. 22 at 3-8]. The requests included the instruction to "provide Plaintiff with requested documents no later than 14 days from time of receipt by Defendant's attorney, Brennan Bolt." [Id. at 3]. Defendant's counsel responded to Plaintiff with a letter dated January 22, 2009, explaining that Defendant had until February 9, 2009, to respond to Plaintiff's requests under the Federal Rules and that Defendant would respond by that date. See (Def. Ex. 1) [Doc. 30-3]. On January 26, 2009, Plaintiff filed his first motion to compel, complaining that he had not been provided with the requested documents within fourteen (14) days. See [Doc. 22].

Defendant served its objections and responses to Plaintiff's requests on February 9, 2009, and produced documents responsive to Plaintiff's requests. (Def. Exs. 3-5) [Docs. 30-5, 30-6, 30-7]. The next day, on February 10, 2009, Plaintiff served his second motion to compel on Defendant, alleging that Defendant had not responded to Plaintiff's previous requests for discovery. See [Doc. 27].

Defendant served Plaintiff with its first request for production of documents to Plaintiff on January 29, 2009. See [Doc. 23]. Plaintiff did not respond to Defendant before the 30-day deadline of March 3, 2009. [Doc. 32, pg 10]. Counsel for Defendant represents that, because he had not received a

response from Plaintiff, he called Plaintiff on March 9, 10, and 12, 2009, attempting to determine the status of Plaintiff's responses to Defendant's discovery requests. [Doc. 30-2, pg 6]. Each time, counsel for Defendant left Plaintiff a voicemail stating that Defendant had not received his responses and asking Plaintiff to call him back. Plaintiff never called Defendant back. Id.

On March 13, 2009, Defendant's counsel sent Plaintiff a letter via Federal Express regarding his response to Defendant's discovery request setting forth Old Dominion's "good faith effort[s]" to resolve the discovery dispute arising from Plaintiff's refusal to respond. The letter was delivered to Plaintiff's address on Monday, March 16, 2009. (Def. Ex. 9) [Doc. 30-11].

Defendant did not receive any response to its letter, and, on March 20, 2009, Defendant's counsel called the Court to request a telephone conference in hopes of resolving the discovery dispute prior to the filing of any discovery motions. [Doc. 30-2, pg 6]. The Court attempted to arrange a telephone conference with Plaintiff, but Plaintiff refused to participate in a telephone conference before the Court. [Id.] The Court advised Defendant of Plaintiff's refusal to participate on March 24, 2009, and Defendant then filed a motion to dismiss or, in the alternative, motion to compel [Id.]

This Court, in its May 15th Order on the pending motions: (1) denied Plaintiff's motions to compel, (2) granted Defendant's motion to compel, (3) denied Defendant's motion to dismiss, (4) advised Plaintiff that "any further failure to comply with his discovery obligations as delineated in the Federal Rules of Civil Procedure will subject Plaintiff to additional sanctions,

including the dismissal of this case," [Doc. 32, pg 13] (emphasis added), and finally (5) awarded Defendant expenses for bringing and defending against the listed motions. [Id.]

On June 3, 2009 Defendant's counsel wrote Plaintiff in an attempt to schedule his deposition. (Def. Br.) [Doc. 45-2, pg 4] Having received no response by June 12, 2009, Defendant noticed Plaintiff's deposition for June 25, 2009 at 10:00 am. [Doc. 39]. Defendant's counsel faxed and served the notice by U.S. mail to Plaintiff (Def. Ex. A) [Doc. 45-3]

On June 22, 2009, three days before his scheduled deposition, Plaintiff served a "Motion in Opposition to Defendant's Notice of Deposition of Tony L. Kelley", seeking "an order protecting him from the subject Deposition.' [Doc. 45]. Defendant's counsel alleges receipt of this motion on June 24th. (Def. Br.) [Doc. 45-2, pg 4]. On June 24th at 11:40 a.m., Defendant's counsel faxed Plaintiff a letter stating that, absent a Court order directing otherwise, Plaintiff's filing of the "Motion in Opposition" would not relieve him of his duty to appear and submit to the scheduled deposition. (Def. Ex. A) [Doc. 45-3].

The following day at 10:00 a.m., Defendant's Counsel and William T. Cranfill, Jr. Vice President and Assistant General Counsel for Defendant, appeared on behalf of Defendant for Plaintiff's deposition. (Def. Ex. A, pg 2) [Doc. 45-3]. At approximately 10:25 a.m., Brennan W. Bolt, counsel for the Defendant, attempted to contact Plaintiff via telephone. (Def. Ex. B, ¶¶ 4, 5) [Doc. 45-4] Failing to reach the Plaintiff, Mr. Bolt left Plaintiff a voicemail message stating that Plaintiff's failure to contact the

Defendant before 11:00 a.m. would cause Defendant to presume that Plaintiff would not appear. [Id.] At 11:00 a.m., Defendant, having received no contact from the Plaintiff, went on the record with a court reporter to document the non-appearance of the Plaintiff. The record is attached as Exhibit A to Defendant's motion. (Def. Ex. A, pg 2) [Doc. 45-3]

Five days after Plaintiff's failure to appear for his deposition, Defendant filed the instant motions. [Doc. 45-1].

II.
Discussion

A. Defendant's Motion to Dismiss

Defendant submits that Plaintiff's conduct during discovery warrants the dismissal of this action because Plaintiff has willfully chosen not to cooperate with Defendant and has refused to comply with the Court's rules and instructions. (Def. Br. at 6-11) [Doc. 45-2].

Rule 41 (b) of the Federal Rules of Civil Procedures provides that an action may be dismissed "[i]f the plaintiff fails to prosecute or to comply with these rules of a court order." Fed.R.Civ.P. 41(b). Furthermore, Rule 37(d)(1)(A)(i) states that a "court . . . may order sanctions if . . . a party . . . fails, after being served with proper notice, to appear for that person's deposition." Fed.R.Civ.P. 37(d)(1)(A)(i). Rule 37 further provides that a court ordering sanctions under the rule may dismiss the action or proceeding "in whole or in part." See Fed R Civ.P. 37(d)(3).

While the Federal Rules of Civil Procedure make clear that a trial court has discretion to impose the sanction of dismissal on a party who fails to obey the court's rules, it "is considered a sanction of last resort, applicable only in extreme circumstances." Goforth v. Owens, 766 F.2d 1533, 1535 (11th Cir. 1985). "[D]ismissal may be appropriate when a plaintiff's recalcitrance is due to willfulness, bad faith or fault." Phipps v. Blakeney, 8 F.3d 788, 790 (11th Cir. 1993). The Eleventh Circuit has articulated a two-part analysis for determining when an action should be dismissed as a sanction: "[t]here must be both a clear record of wilful conduct and a finding that lesser sanctions are inadequate." Zocaras v. Castro, 465 F.3d 479, 483 (11th Cir. 2006) (citing Betty K Agencies, Ltd. v. M/V Monada, 432 F.3d 1333, 1339 (11th Cir. 2005)). Findings satisfying both prongs must be made before dismissal is deemed an appropriate sanction. See Betty K Agencies, 432 F.3d at 1339; Mingo v. Sugar Cane Growers Co-op, of Fla., 864 F.2d 101, 102-3 (11th Cir. 1989) (per curiam).

Within the context of discovery violations, 11th Circuit precedent has displayed a willingness to find the requisite bases for dismissal where the Plaintiff has repeatedly violated her discovery obligations and in so doing, has violated a court order. Hepperle v. Johnston 590 F.2d 609 (5th Cir. 1979) (Plaintiff "not only exhibited a pattern of delay, but also received a warning of dismissal and refused to obey court orders to appear.") citing to Ramsay v. Bailey, 531 F.2d 706, 709 (5th Cir. 1976). See also, Buchanan v. Bowman 820 F.2d 359 (11th Cir. 1987), Mene v. Marriott International Inc., 238 Fed.Appx. 579 (11th Cir. 2007). Thus, in Hepperle, the Court of Appeals upheld an order granting a motion to dismiss where the Plaintiff

had failed to attend four depositions (two of them court ordered), and had been warned by the Court that dismissal would be considered should he fail to attend another. Hepperle 590 F.2d at 612. Similarly, in Buchanan the 11th Circuit upheld a dismissal where Plaintiff had, in contravention of a motion to compel, failed to respond to Defendant's interrogatories, and had, after receipt of an oral warning, failed to attend a noticed deposition. Buchanan 820 F.2d at 360-362.

Here, Defendant points to the following conduct in demonstrating Plaintiff's wilfulness:

(1) Plaintiff refused to participate in a Rule 26(f) conference with Defendant until the Court instructed him to do so at the November 24, 2008, scheduling conference;

(2) Plaintiff filed his first motion to compel prior to Defendant's deadline without making any effort at conferring with Defendant as required by the Federal and Local Rules;

(3) Plaintiff filed a second motion to compel without attempting to confer with Defendant;

(4) Plaintiff failed to respond to Defendant's first request for discovery;

(5) Plaintiff failed to return any of Defendant's phone calls regarding his response to Defendant's written discovery;

(6) Plaintiff did not respond to Defendant's letter of March 13 regarding his failure to serve his discovery responses; and

(7) Plaintiff refused to participate in a telephone conference with the Court in an effort to resolve the outstanding discovery disputes.

(8) Plaintiff filed a frivolous motion for a protective order to avoid being deposed by claiming that his deposition would be unlikely to lead to discovery of admissible evidence.

(9) Plaintiff did not confer with Defendant before filing the motion for the protective order.

(10) Having been advised by Defendant's counsel that his motion for a protective order did not relieve him of his obligation to appear, Plaintiff failed after notice to appear for his deposition.
(Def. Br. at 8-9) [Doc. 45-2].

Like the Plaintiff's in Buchanan and Hepperle, the Plaintiff in this case has, in the face of a warning of dismissal, engaged in repeated violations of the discovery rules. In this Court's May 15th Order, Plaintiff was warned that "failure to comply with this order or any further failure to comply with . . . discovery obligations as delineated in the Federal Rules . . . will subject Plaintiff to additional sanctions, including the dismissal of the case." [Doc. 32, pg 13] (emphasis added). Despite this warning, Plaintiff filed, without the required certification of good faith, a "Motion in Opposition" to his noticed deposition, seeking a protective order with regards to Furthermore, after filing the "Motion in Opposition," Plaintiff failed to fulfill his duty under the Federal Rules by failing to attend his deposition. See Hepperle 590 F.2d at 613 ("court's inaction on appellant's motion [to stay] did not relieve him of the duty to appear for

his deposition."), Mene, 238 Fed. Appx. At 581 (Plaintiff's failure to appear for deposition while motion for protective order pending was a willful violation of the Federal Rules).

In light of these clear violations of the Federal Rules in the wake of this Court's prior application of lesser sanctions and explicit warning that further violations could result in dismissal, this Court finds "both a clear record of wilful conduct and . . . that lesser sanctions are inadequate." See Zocaras, 465 F.3d at 483. Accordingly, Defendant's motion to Dismiss is due to be **GRANTED**.

B. Defendant's Motion to Compel, Motion to stay and Motion to Extend Discovery

Having granted Defendant's motion to dismiss, this Court **DENIES as moot** Defendant's motion to compel Plaintiff's deposition, Defendant's motion to stay and Defendant's motion to extend discovery. Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359, 1366 n.5 (11th Cir. 2005) (affirming district court's dismissal of motion to compel and motion for summary judgment after in light of district court's grant of a motion to dismiss).

C. Plaintiff's Motion for Summary Judgment and "Letter Motion" for Length of Time for Decision

Because this Court has granted Defendant's motion to dismiss, Plaintiff's motion for summary judgment and Plaintiff's motion for length of time for decisions are both **DENIED**. Id.

D. Defendant's Motion for Sanctions

The Federal Rules grant substantial discretion to a district court in regard to determining whether a case should be dismissed for failure to comply with discovery rules. The law regarding the sanction of costs and attorney fees, however, is less flexible. Fed. R. Civ. P. 37(d)(3). Federal rule 37(d)(3) provides that where a party has failed to attend his own deposition, serve answers to interrogatories, or respond to requests for inspection, "the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust." Id. (emphasis added).

Plaintiff has not responded to Defendant's motion for sanctions, and there is nothing that appears on the record that would make an award of expenses unjust or suggest mitigating circumstances. Therefore, Defendant's motion for sanctions must be **GRANTED**. Defendant may present appropriate documentation of its expenses, including attorney's fees, incurred in preparing this motion, as mandated under Rule 37 (d)(3), within ten (10) days of the entry of this order. Plaintiff shall have ten (10) days thereafter to respond.

III.
Conclusion

In sum, Defendant's unopposed motion to dismiss [Doc. 45] is **GRANTED**, while Defendant's alternative motions to compel and extend discovery [Doc. 45], and motion to stay [Doc. 48] are **DENIED as moot**.

Furthermore, Plaintiff's motion for summary judgment [Doc. 47] and "motion letter" [Doc. 49] are **DENIED**.

IT IS ORDERED that Defendant may present appropriate documentation of its expenses in responding to Plaintiff's motions to compel and in preparing its motion to dismiss within ten (10) days of the entry of this order pursuant to Rule 37. Plaintiff will have ten (10) days thereafter to respond.

SO ORDERED, this 28th day of August, 2009.

S/ E. Clayton Scofield III
E. Clayton Scofield III
UNITED STATES MAGISTRATE JUDGE

APPENDIX C

Thirteenth Amendment to the United States Constitution

1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

2. Congress shall have power to enforce this article by appropriate legislation.

Fourteenth Amendment to the United States Constitution, Sections 1 and 5

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Title VII of the Civil Rights Act of 1964

An Act - To enforce the constitutional right to vote, to confer jurisdiction upon the district courts of the United States to provide injunctive relief against discrimination in public accommodations, to authorize the attorney General to institute suits to protect constitutional rights in public facilities and public education, to extend the Commission on Civil Rights, to prevent discrimination in federally assisted programs, to establish a Commission on Equal Employment Opportunity, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Civil Rights Act of 1964".

1. **SEC. 2000e-2.** ***[Section 703]***

(a) Employer practices

It shall be an unlawful employment practice for an employer -

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

2. Discriminatory practices under these laws also include:

- harassment on the basis of race, color, religion, sex, national origin, disability, genetic information, or age;
- retaliation against an individual for filing a charge of discrimination, participating in an investigation, or opposing discriminatory practices;
- employment decisions based on stereotypes or assumptions about the abilities, traits, or performance of individuals of a certain sex, race, age, religion, or ethnic group, or individuals with disabilities, or based on myths or assumptions about an individual's genetic information; and
- denying employment opportunities to a person because of marriage to, or association with, an individual of a particular race, religion, national origin, or an individual with a disability. Title VII also prohibits discrimination because of participation in schools or places of worship associated with a particular racial, ethnic, or religious group.

Employers are required to post notices to all employees advising them of their rights under the laws EEOC enforces and their right to be free from retaliation. Such notices must be accessible, as needed, to persons with visual or other disabilities that affect reading.

Title VII prohibits not only intentional discrimination, but also practices that have the effect of discriminating against individuals because of their race, color, national origin, religion, or sex.

OCGA 34-7-1, "Master and Servant"

§ 34-7-1. Determination of term of employment; manner of termination of indefinite hiring

> If a contract of employment provides that wages are payable at a stipulated period, the presumption shall arise that the hiring is for such period, provided that, if anything else in the contract indicates that the hiring was for a longer term, the mere reservation of wages for a lesser time will not control. An indefinite hiring may be terminated at will by either party.

Judicial Decisions and General Considerations

Basis of master / servant relationship. – The relation of master and servant arises out of a contract of employment expressed or implied between a master or employer upon the one hand, and the servant upon the other hand. *Small v. Nu Grape Co. of Am.*, 46 Ga. App. 306, 167 S.E. 607 (1933).

Characteristics of masters. – The master has a superior choice, control, and direction of the servant, and whose will the servant represents not merely in the ultimate results of the work but in the details. *Small v. Nu Grape Co. of Am.*, 46 Ga. App. 306, 167 S.E. 607 (1933).

Characteristics of servants. – The servant is a person employed to labor for the pleasure or the interest of another. *Small v. Nu Grape Co. of Am.*, 46 Ga. App. 306, 167 S.E. 607 (1933).

Work of Servant generally related to manual service. – It has been generally said that agency relates to business transactions, while the work of a servant relates to manual service. *Headrick v. Fordham*, 154 Ga. App. 415, 268 S.E.2d 753 (1980).

Test to determine relationship of parties. – The crucial test to be applied in determining whether the relationship of the parties under a contract for the performance of labor is that of master and servant, or that of employer and independent contractor, lies in whether the contract gives, or the employer assumes, the right to control the time, manner and method of executing the work, as distinguished from the right merely to require certain definite results in conformity to the contract. *Federated Mut. Implement & Hdwe. Ins. Co. v. Elliott*, 88 Ga. App. 266, 76 S.E.2d 568 (1953).

28 U.S.C. § 2403(b)

> In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a

party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.